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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KELLY SEAN SPENCER, Defendant and Appellant.	G045566 (Super. Ct. No. 10WF2324) O P I N I O N
In re KELLY SEAN SPENCER on Habeas Corpus.	G046182

Petition for a writ of habeas corpus and appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Petition denied and judgment affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lynne G. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Kelly Sean Spencer of stalking (Pen. Code, § 646.9, subd. (a))[1] and two counts of making criminal threats (§ 422). His victim was a wheelchair-bound woman suffering from cerebral palsy.

On appeal, defendant contends the court erred by failing to stay execution of sentence on his criminal threat convictions pursuant to section 654. Additionally, he petitions for a writ of habeas corpus, contending he was denied the effective assistance of counsel at sentencing because his attorney failed to request a hearing on his financial ability to pay the costs of the probation report. We consolidated his petition with his appeal. We now deny his petition and affirm the judgment.

FACTS

At the time of trial, the victim, J.P., was 27 years old. She suffered from cerebral palsy and had been in a wheelchair all her life.

J.P., who identified defendant as an ex-boyfriend, had met him through a voice telephone dating service in February, May, or June of 2010. They talked several times a day for several hours. They discussed her disability and possibly meeting in person. Defendant disclosed he had served time in a federal prison for the manufacture

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[1] All statutory references are to the Penal Code.

and use of explosive devices. But he claimed to have changed and turned his life over to God.

Around June or July of 2010, defendant, who lived in Oklahoma City, came to California, although J.P. had asked him, on the morning he departed, not to come.[2] For two days, defendant was "stranded" at Union Station in Los Angeles. The next night, J.P. arranged for a motel room, where she and defendant stayed for four to five nights and had consensual sex. Defendant acted as J.P.'s caretaker while they were at the motel. J.P. introduced defendant to her cousin.

Defendant returned home to Oklahoma. He and J.P. continued to date by phone. They talked about defendant becoming J.P.'s caretaker in California. J.P. wanted defendant to return to California. In late July, she bought him a $100 train ticket and mailed it to his house.

But social workers informed J.P. that defendant could not pass the background check to become her caretaker. Meanwhile, defendant had become possessive and controlling, phoning J.P. from 30 to 40 times a day, "wanting to know where [she] was, if [she] was cheating on him, if [she] was faithful to him, who [she] was with because it was obvious to him that [she] had to be with another man if [she] didn't answer [her] phone."

In the last week of July, one week after sending defendant the train ticket, J.P. told him that their relationship was unhealthy and asked him not to contact her again. During the conversation, J.P.'s caretaker/roommate was present by phone.

Defendant was angry and continued to phone J.P. from 50 to 100 times a day. J.P. changed her phone number twice and replaced her phone twice, but defendant continued to contact her.

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[2] All dates refer to 2010, unless otherwise stated.

The threats became bad in September. On September 13, defendant said "he was going to kill [her], if he couldn't have [her,] no one would." Defendant also phoned J.P.'s cousin, Misty.

J.P. phoned defendant many times and told him to stop. She feared for her life, and felt helpless due to her disability.

J.P. contacted the police. An officer came to her home on September 13 and again on September 16. The officer observed that J.P. looked scared: her voice trembled, she was crying, and she often had to be asked a question more than once because she was so upset. Defendant's threatening phone calls continued. On September 17, J.P. stopped listening to the messages and turned the phone over to the police.

At trial, the jury heard a recording of defendant's recorded messages from the afternoon of September 16 through the evening of September 17. In the messages, defendant threatened J.P., her family, and her caretaker/roommate. He said he was making a bomb (a "masterpiece" for which he had "bought pipes") and was "staying right here in this beautiful little city of [hers], until [he could] fucking blow [her] fat ass outta that apartment!" He said he was "right down the street" from her and watching her apartment building to see which unit was hers. In one of his final messages, he said, "Fucking scumbag bitch! And now, you got to die. . . . You cannot live. . . . You're going. You're dying. I will not sit still, until I see your fucking brains splattered all over the front of that goddamn apartment complex, bitch! . . . I want to see your hair all matted with blood and in pieces. See your itty bitty pieces of your skull scattered all around that place."

Defendant called J.P. stupid, retarded, disgusting, nasty, and raggedy, as well as a "triple chin, ugly fat hippo," and said her mother should have aborted her and that J.P. should have died at birth. He accused her of infecting him with AIDS; he said he had dramatically lost weight and had nothing to lose since he was dying anyway. (J.P. testified she tested negative for AIDS.)

But defendant also said he loved J.P. and she was his whole world. He just wanted to talk to her: "All you got to do is talk to me on the phone, you stupid bitch!" "You are making it so hard that you . . . can't even talk to me on the phone!" "I wouldn't do this if I didn't love you so much. You need to help me to stop. Just talk to me one time." "[W]hy can't you just answer the phone?"

J.P. believed, based on the phone calls, that defendant was nearby. The investigating police officer never found defendant in Orange County or any information that defendant was in Orange County between September 14 and 22.

Sentence

The court sentenced defendant to the aggravated term of three years for stalking J.P., a particularly vulnerable victim. The court sentenced him to a consecutive term of eight months (one-third the midterm) for making a criminal threat on September 13. The court sentenced him to a concurrent term of two years (the midterm) for making a criminal threat on September 16, based on the mitigating factor of defendant's prior public service as a FEMA volunteer. The court ordered defendant to pay the cost of the probation report from his prison wages.

DISCUSSION

The Court Did Not Err Under Section 654 by Executing Sentence on the Stalking and Criminal Threats Convictions

Defendant contends his only objective for stalking J.P. *and* for making criminal threats against her was to scare her. He concludes his sentence constitutes multiple punishment violative of section 654.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the

provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) Our Supreme Court, although critical of this test, has also reaffirmed it as the established law. The high court noted, "however, that cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. In those cases, multiple punishment was permitted." (*Id.* at p. 952.)

"'The defendant's intent and objective are factual questions for the trial court." (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) The court's findings (express or implied) are subject to the substantial evidence standard of review. (*Ibid.*; *People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

The elements of the offense of stalking differ from those of the crime of making criminal threats. As to stalking, the court instructed the jury the People had to prove defendant: (1) maliciously harassed another person, i.e., engaged in conduct "that seriously annoys, alarms, torments, or terrorizes the [victim and] serves no legitimate purpose"; and (2) made a credible threat intended to place the other person in reasonable fear for her safety or that of her immediate family. (CALCRIM No. 1301.) In contrast, as to making criminal threats, the court instructed the jury the People had to prove, inter alia, that: (1) defendant threatened to unlawfully kill or cause great bodily injury to J.P.; and (2) the threat was "so clear, immediate, unconditional, and specific that it communicated to [J.P.] a serious intention and the immediate prospect that the threat would be carried out." (CALCRIM No. 1300.)

Here, substantial evidence supports the court's implied finding defendant had more than one objective for stalking J.P. and making the two charged criminal threats against her. The September 13 and September 16 criminal threats against J.P. included his clear, immediate, unconditional, and specific threats to kill her and to blow her up with a bomb. His stalking offense, on the other hand, had a separate identifiable objective. Defendant harassed J.P. over a period of time between September 1 and 17 (as charged in the information) in order (at least in part) to annoy and torment her. Substantial evidence of his intention to annoy, torment, and harass her included: (1) the number and frequency of the phone calls; (2) his mean words, name calling, and accusations against her; (3) his efforts to make her feel guilty; and (4) his threats against her family. Defendant even stated in one phone call, "[T]hat is not the whole goal to scare you, it's not." During this time period, he made some ambiguous threats which did not threaten to kill or inflict great bodily injury on J.P. For example, he threatened that he would not leave and would chase her to the end of the world. He threatened to rape J.P.'s roommate/caregiver. He threatened to phone J.P.'s cousin, Misty, and to creep in the cousin's back yard.

Defendant relies on *People v. Mendoza* (1997) 59 Cal.App.4th 1333, but there, both parties agreed the defendant's "two convictions arose from a single act." (*Id.* at p. 1346.) Here, in contrast, defendant phoned J.P. many, many times over a period of numerous days, compared to the criminal threats made on two discrete days.

Defendant was Not Prejudiced by his Counsel's Failure to Request a Hearing on Defendant's Ability to Pay the Costs of the Probation Report

In his petition for a writ of habeas corpus, defendant contends his counsel performed deficiently by failing to request a hearing on his ability to pay for the preparation of a presentence probation report. Defendant asks this court to modify the judgment to delete his obligation to pay this cost, or, alternatively, to remand the matter

to the trial court for a hearing on his ability to pay.

To prove an ineffective assistance claim, a defendant must show that (1) "counsel's performance was deficient," *and* (2) "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 692.) A court need not "address both components of the inquiry if the defendant makes an insufficient showing on one." (*Id*. at p. 697.) To prove prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

Under section 1203.1b, subdivision (a), when a defendant is convicted of an offense and is the subject of a presentence investigation and report, the probation officer must determine the defendant's ability to pay all or part of the reasonable cost of conducting the investigation and preparing the report. The probation department must develop a payment schedule based on the defendant's income; the schedule is subject to the court's approval. (*Ibid.*) The probation officer must inform the defendant of his right to a hearing in which the court determines the defendant's ability to pay and the amount of the payment. (*Ibid.*) The defendant may waive the right to a court hearing only by a knowing and intelligent waiver.

The probation report stated defendant was employed as a house painter at a salary of $2,400 per month and as a mechanic's assistant at a salary of $300 a week. Defendant did not believe a felony conviction would impact his employment, "as his employers are aware of his prior convictions." The probation officer reported: "The defendant has been notified of his right to a Financial Hearing pursuant to [section 1203.1b]. The Probation Department has conducted a financial evaluation and determined that he has the ability to pay for the costs of probation, including the cost of this report in the amount of $2,762.17. It is recommended that he be ordered to pay for the costs of probation in the amount of $136.78 per month until paid in full."

At the sentencing hearing, the court ordered defendant to pay the preparation cost of the probation report, i.e., $2,762.17, from his prison wages.

As exhibits to his petition for a writ of habeas corpus, defendant attached his own declaration and one from his trial counsel. In defendant's declaration, he declared: (1) he had no real estate and no personal property beyond clothing stored with his mother; (2) he could not pay the $2,762.17; (3) he did not read the probation report and did not pay attention when the trial judge ordered him to pay this amount as he was focused on his prison sentence; and (4) his trial counsel never discussed his ability to pay with him.

In trial counsel's declaration, the attorney declared: (1) he saw the probation department's request in the probation report that defendant be ordered to pay $2,762 for the report's preparation cost; (2) he recalled defendant "had limited financial resources" and had "spent approximately three weeks on the street in Los Angeles until Traveler's Aid bought him a bus ticket back to his home in Oklahoma"; and (3) he (counsel) "could have asked for a hearing [on defendant's] ability to pay this amount, and did not have a tactical reason for not doing so."

We need not determine whether counsel's performance was deficient because we conclude there is no reasonable probability that, had trial counsel asked for a hearing on defendant's ability to pay, the result of the proceeding would have been different. Defendant's earning ability as a painter and as a mechanic's assistant, along with the reasonable requirement that his prison wages be applied toward his payment plan, make it unlikely that the court would have decreased or eliminated his payments towards the preparation costs of the probation report.

Defendant relies on *People v. Le* (2006) 136 Cal.App.4th 925, but that case is inapt. In *Le*, the appellate court held that a consecutive sentence on a burglary conviction violated section 654 and that trial counsel was ineffective concerning excessive restitution and parole revocation fines. (*Id.* at p. 928.) But trial counsel's error

was prejudicial only because it was reasonably probable the trial court would have imposed smaller fines "if trial counsel had objected both to the improper consecutive sentence and to the trial court's improper inclusion of the burglary conviction when the court calculated the restitution fine . . . ." (*Id.* at p. 935.)

DISPOSITION

Defendant's petition for a writ of habeas corpus is denied. The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.